No. 16403

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN RUSSELL HANSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant United States Attorney,
Chief, Criminal Division,

LEILA F. BULGRIN,
Assistant United States Attorney,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellee,
United States of America.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction by a jury on November 28, 1958, in a trial before the United States District Court for the Southern District of California, the Honorable Ernest A. Tolin presiding, which adjudged the defendant guilty on each of twenty-one counts of an Indictment returned by the Grand Jury for the Southern District of California. There were twenty-two counts in the Indictment, which was brought under the provisions of Sections 287 and 495 of Title 18, United States Code, but Count One was dismissed by the Court because of the manner in which the verdict had been made out by the jury as to Count One.

The jurisdiction of the United States District Court was based upon Section 3231, Title 18, United States Code.

On December 5, 1958, the defendant appeared in open court in person and by counsel and was sentenced to the custody of the Attorney General. A written Judgment and Commitment was filed by the Court on the same day. The Criminal Docket Entries made by the Clerk of the United States District Court for the Southern District of California show an entry of the terms of the judgment and conviction and, immediately thereafter, the following notation appears in typewriting: "Judgmt. Ent. 12/8/58." However, the number "15" is shown to have been written in ink over the number "8" in the above date "12/8/58."

The Clerk's minutes of the case for December 12, 1958, show that on that date Paul Fitting was appointed as counsel for appellant on the appeal and also that the Court ordered the judgment should be entered on 12/15/58.

The above Criminal Docket Entries and the minutes of the Court for December 12, 1958 are contained in the supplemental record on appeal before this court and therefore appellee is unable to refer to the Clerk's Transcript of Record at this time.

Normally this court would have jurisdiction to entertain the within appeal and to review the proceedings leading to the judgment of December 5, 1958, by reasons of Sections 1291 and 1294 of Title 28, United States Code. However, because of the status of the record as indicated above it appears that there is a question as to whether or not this court actually does have jurisdiction on appeal. This point is discussed herein in the Argument.

II.
STATUTE INVOLVED.

The defendant was prosecuted on Counts One, Four, Five, Six, Nine, Ten, Eleven, Fourteen, Sixteen, Seventeen, Eighteen, Nineteen and Twenty-Two of the United States Code Title 18, Section 287, which reads in pertinent part as follows:

> "Whoever makes or presents . . . to any department or agency . . . any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both."

The defendant was prosecuted on Counts Two, Three, Seven, Eight, Twelve, Thirteen, Twenty and Twenty-One under United States Code, Title 18, Section 495, which reads in pertinent part as follows:

> "Whoever falsely . . . forges . . . any . . . writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States of any officers or agents thereof, any sum of money . . .
>
> "Whoever utters or publishes as true any such . . . forged . . . writing, with intent to defraud the United States, knowing the same to be . . . forged . . .
>
> "Shall be fined not more than $1,000 or imprisoned not more than ten years, or both."

III.
STATEMENT OF THE CASE.

Fourteen of the twenty-two counts of the indictment returned against appellant on October 15, 1958, contain charges of the making of as many separate false claims for refund of income taxes. Four of the remaining eight counts charge the forgery of separate United States Treasury checks. The other four counts charge the uttering of each one of said checks.

It is to be noted that there are six post office box addresses set forth in the indictment. Counts One through Five involve Post Office Box 235, McKittrick, California. Counts One, Four and Five charge that false claims for refund on income taxes on Form 1040A were filed for that address in the names of Joseph J. Cook, Kenneth Cook and Joseph Cook. Counts Two and Three charge the forgery and uttering of a Treasury check for the sum of $267.40 payable to Joseph J. Cook mentioned in Count One.

Counts Six through Ten involve Post Office Box 1162, Taft, California. Counts Six, Nine, and Ten charge the making of false claims for refunds in the names of Peter Hall, William Hall, and William H. Hall for that address. Counts Seven and Eight charge the forgery and uttering of a Treasury check for $296.20 in the name of Peter Hall set forth in Count Six.

Counts Eleven, Fourteen and Fifteen charge the making of false claims for refunds for Post Office Box 304, Glennville, California, in the names of Allan J. Jones, Allan Jones and James Jones. Counts Twelve and Thirteen charge the forgery and uttering of a Treasury check

in the sum of $270.50 payable to Allan J. Jones set forth in Count Eleven.

Counts Sixteen, Seventeen and Eighteen charge the making of false claims for refunds with respect to the address of Post Office Box 451, Poplar, California, in the names of Stanley Jones, Sidney J. Jones and Sidney Jones. There are no counts involving the forgery and uttering of a check issued in any such names.

Counts Nineteen and Twenty-two charge the making of false claims for refunds with respect to Post Office Box 916, Tehachapi, California, in the names of Walter Adams and James Adams. Counts Twenty and Twenty-one charge the forgery and uttering of a Treasury check in the amount of $290.10 payable to the name of Walter Adams, mentioned in Count Nineteen of the indictment [Clk. Tr. 2-15]. All of the offenses were alleged to have occurred from March 28, 1958 to June 13, 1958.

On November 18, 1958, when the matter came on for jury trial [Rep. Tr. 39-A] the jury was selected and impaneled. During the proceedings counsel for the government and appellant received a written copy of the roster of the venire and exercised peremptory challenges in writing thereon [Clk. Tr. 21, 22].

Immediately thereafter, in the presence but out of the hearing of the jury, counsel for both parties and the defendant approached the side bar. The following colloquy took place:

> "The Court: Defense counsel has challenged twelve, peremptorily. You have challenged twelve. You are only allowed ten.
>
> Mr. Turner: I am sorry.

The Court: What do you wish to do?

Mr. Turner: I will remove two of the peremptory challenges, your Honor, if two of them coincide with her peremptory—

The Court: Please speak out so the reporter can hear you.

Mr. Turner: If two of them coincide with the peremptory challenges made by the government, perhaps it can be disposed of in that way.

The Court: You are asking me to enlarge the number of challenges?

Mrs. Bulgrin: I think he was asking the court to take off two that may have coincided with two I had made, but I think perhaps the better procedure would be for him to remove two of his own selections, your Honor.

The Court: If we enlarge the number of challenges, will we have enough?

The Clerk: No, your Honor.

The Court: You elect which ten you are going to challenge.

Mr. Hanson, whenever your attorney comes to the side bar here, you come along.

The Court: I see that the names of Joe L. Stevens and Harry Green, who were originally challenged have now been removed from the challenges. Is that correct?

Mr. Turner: May I see? Yes, your Honor.

* * * * * * *

The Court: All right. The clerk will now call the jurors to the box in the order in which they remain upon the consolidated lists as unchallenged."

The clerk then called twelve names and the jury was sworn upon the direction of the Court. [Rep. Tr. 39-B

to 39-D.] Subsequently two alternate jurors were called, the Court allowing the parties one additional challenge in that respect. [Rep. Tr. 39-E, 39-G, 39-H.]

It appears that nothing further was said by counsel for appellant with respect to the procedure followed in exercising the peremptory challenges.

Government counsel made an opening statement indicating to the jury that the government's evidence was expected to show that the defendant's method of operation in connection with the charges in the indictment was to rent post office boxes under fictitious names, filing several false claims for income taxes with the government showing the addresses of the post office boxes. The returns would all be filed under the false name under which the box was rented or variations of that name. In four instances, in connection with the charges in the indictment, United States Treasury checks for refunds were issued to four different post office boxes. The defendant then started accounts at banks in small nearby towns with small cash deposits. A few days later he came into the banks and deposited the United States Treasury checks which he had gotten as a result of filing the false returns. Almost simultaneously he would then draw out of the account practically all the money that was represented by the small cash deposits and the proceeds of the Treasury checks [Rep. Tr. 47, 48].

After opening statement by defense counsel, the government called five witnesses to the stand. The first witness was the Assistant Regional Disbursing Officer for the Division of Disbursement of the United States Treasury Department in Los Angeles. His testimony primarily involved the four United States Treasury checks, Exhibits

Nos. 1, 2, 3 and 4, involved in Counts 2, 3, 7, 8, 12, 13, 20 and 21 of the indictment and related primarily to the issuance of these checks by the Treasury Department and the mailing of them in window envelopes to the name and address of each payee shown on the exhibits. [Rep. Tr. 70-80.]

The next witness, Julius A. Horwitz, was the Chief of the Computation, Verification and Matching Section of the Collection Division of the Los Angeles District of the Internal Revenue Service, which Section processed all of the tax returns that came into the Los Angeles District. Those returns included 1040 A Forms. His testimony particularly related to Exhibits 5 through 18, which comprised the alleged false returns set forth in Counts 1, 4, 5, 6, 9, 10, 11, 14, 15, 16, 17, 18, 19 and 22 of the indictment. He stated that those forms are available to the public in a number of ways, from Internal Revenue Offices, banks and Post Offices. Approximately 99 percent of the returns which were processed by his Section came to the Bureau of Internal Revenue through the mail. Exhibits 5 through 18 were being handled by the Income Tax Processing Group when he first saw them and they were taken out under his supervision. Some of the returns had been actually processed, that is, Exhibit No. 11, William H. Hall; Exhibit No. 12, Allan J. Jones; Exhibit No. 14, James Jones; Exhibit No. 6, Stanley Jones; Exhibit No. 15, Sidney J. Jones; Exhibit No. 17, Walter Adams; Exhibit No. 18, Peter Hall; and Exhibit No. 7, Joseph Cook. However the exhibits named were not all processed through for the issuance of a refund check. The ones on which checks were issued were Exhibit No. 7, Joseph Cook; Exhibit No. 12, Allan J. Jones; Exhibit No. 17, Walter Adams;

and Exhibit No. 18, Peter Hall. All of these returns were received by the Department of Internal Revenue through the mail for processing purposes. Mr. Horwitz further testified that the blank 1040A Forms were first available to the public for the year 1957 after Christmas at the end of that year or right after January 1, 1958. The tax returns had to be filed by April 15 and all of the returns in Exhibits 5 to 18 were filed before that date. [Rep. Tr. 81-94.]

The next witness was Frank D. Johnson, Chief of the Claims Section of the Los Angeles District of the United States Bureau of Internal Revenue. Mr. Johnson's testimony primarily was concerned with Exhibits 7, 12, 17 and 18 (it appears that Exhibit 17 was erroneously enumerated in a question put by government counsel as No. 19. Other questions and answers establish that the witness was talking about Exhibit 17 [Rep. Tr. 97] rather than Exhibit 19 at that point of the proceedings) which exhibits were the 1040A forms involving Joseph J. Cook, Allan J. Jones, Walter Adams and Peter Hall, which had been processed to the point of a check being issued [Rep. Tr. 90] and Exhibits 1, 2, 3 and 4 which were the four government checks. The testimony of this witness related the issuance of the checks to the particular 1040A Form. For instance, Exhibit 1, a check for $296.20, was related to Exhibit 18 which involved Peter Hall. By using certain account numbers which were repeated on related documents, the witness also testified, in effect, that the check which was Exhibit 4 was issued because of Exhibit 7, the 1040 A return in the name of Joseph J. Cook. He testified similarly as to Exhibits 2 and 12, the check and 1040 A Form in the name of Allan J. Jones, and also with respect to Exhibits 17 and 3, which were the check and 1040 A Form in the name of Walter Adams. He testified

that his records showed that each one of the four checks had been issued to the payees shown thereon and for the amount set forth. The total amount of all four checks was approximately $1,124.20. [Rep. Tr. 96-106.] The government, pursuant to a stipulation with appellant, then offered in evidence the names of the real persons to whom the Social Security Numbers on nine of the 1040A returns were actually issued and also the dates that the numbers were issued. [Rep. Tr. 108, 109.] They were different than the names on the returns.

The next witness on November 18, 1958, was a receptionist supervisor in the Los Angeles office of the Social Security Administration who testified in part that four of the Social Security Numbers contained on other 1040 A returns in evidence not covered by the stipulation were "impossible" numbers. She further stated that every person who is assigned a Social Security Number retains it for a lifetime. [Rep. Tr. 109-111.]

The last witness on that day was an employee of the Brown Drilling Company in Long Beach who testified that neither Sidney J. Jones listed on Exhibit 15, nor the persons named on other 1040A Forms which were Exhibits 7 and 11 were employed by the Brown Drilling Co. [Rep. Tr. 112-118.] (All of these exhibits listed the Brown Drilling Co. as the employer of the alleged taxpayer named therein.)

On the second day of trial, counsel for appellant made a motion for the exclusion of witnesses "until such time as the prosection has placed on the stand all their respective identification witnesses." [Rep. Tr. 21.] Government counsel opposed the motion, stating, "I do not *believe* any of these people were present at the same time,

at the same place; their testimony will deal with various occasions." Later she stated "*to the best of my knowledge* they are all at different times and places, your Honor." Government counsel also stated in response to the Court's inquiry that the witnesses had made identifications prior to trial. The Court stated subsequently that "the motion comes pretty late anyway. This is the second day of trial. The courtroom has had a lot of witnesses present here. Some courts never grant these motions. I do in some instances where it appears proper to do so, but there has not been that showing here. So the motion will be denied. Bring in the jury." [Rep. Tr. 121, 123.]

The next four witnesses, Marlin Rolain, Joseph A. LaRoche, Russell Goforth and Harold J. Brandenburg, gave similar testimony to that of Alice Barnwell, who worked in the personnel department of the Brown Drilling Co. They were employed by the Brown & Williamson Tobacco Co., Singer Sewing Machine Company, and Firestone Tire & Rubber Co. Rolain testified that, with respect to Exhibits 6, 8 and 10, which were 1040 A forms, the persons named thereon, Kenneth Cook, Stanley Jones, and William Hall, had never worked for the Brown & Williamson Tobacco Co. The latter company was the employer shown on each of those exhibits. LaRoche testified that with respect to Exhibits 5, 9, 12, 16 and 18, which were 1048 forms in the names of Allen J. Jones, Joseph Cook, Sidney Jones, James Adams and Peter Hall, and which listed the Singer Sewing Machine Co. as the employer, none of those persons had ever worked for that concern. Mr. Goforth gave similar testimony as that of the previous witness, but dealt with a Singer Sewing

Machine Company facility at Armona, California. [Rep. Tr. 123-132.]

Mr. Brandenburg also testified in a similar vein, being the Assistant Comptoller of the Firestone Tire & Rubber Co., Coast Division. His testimony primarily involved Exhibits 14 and 17 relating to Walter Adams and James Jones where the Firestone Tire & Rubber Co. was shown to be the employer. He stated that no persons by those names were employed by that concern in California. [Rep. Tr. 132-134.]

The next four witnesses, Alice M. Perciful, Laura A. Skelton, Armand K. Hanna, and Margaret S. Werling were postmasters, respectfully, at Tehachapi, Glennville, Taft and McKittrick. Mrs. Perciful's testimony involved Exhibit No. 22, an application for Post Office Box 916, Tehachiapi, California, in the name of Walter Adams. It also contained the name of James Adams and was dated October 15, 1957. She described the applicant for the post office box as a nice-appearing gentleman, medium colored hair, average build, who appeared to be a very well-dressed person for a truck driver, which he listed as his occupation. His box never received any mail except one brown government envelope. The letter was taken out of the box when the town was having a Memorial Day celebration on the 31st of May, 1958. She stated that Tehachapi is about 80 miles from Taft and about 42 miles from Bakersfield. [Rep. Tr. 135-141.]

Mrs. Skelton testified that Exhibit 23 was a post office box receipt for box 304, Glennville, California, in the name of Allan Jones which she made out herself. It was dated September 13, 1957 for a year. She did not remember what the person looked like who rented the box, but

he was about 5 feet 10. The box did not receive any mail that she could recall except one brown government envelope, which appeared to contain a check. This occurred in May of 1958 and it was taken out during the night or over a week-end while she was not at the post office. [Rep. Tr. 142-146.]

Mr. Hanna was the assistant postmaster at Taft, California, and testified that Exhibit No. 24, an application for post office box 1162, Taft, California, dated December 2, 1957, in the name of Peter Hall, was part of his records in the post office, having been made out in the regular course of business when the box was rented. This particular application contained a signature of the alleged "Peter Hall" made out by the applicant. Taft was about 40 miles from Bakersfield. [Rep. Tr. 147-152.]

Mrs. Werling testified that Exhibit No. 25, a "box rent register" for post office box 235, McKittrick, California, in the name of Joseph Cook, related to the box which she rented to a person giving the name of "Joseph Cook." It was first rented in the last of December, 1956, and eventually was re-rented up to June 30, 1958. She had never seen the person who rented it around McKittrick or

At one time there were two personal letters in the box that laid there for some time and they were taken out at night. There was a brown government envelope put in the box some time in May, 1958. It stayed in the box about two or three weeks and was taken out over the weekend of Memorial Day. She stated that McKittrick was about 40 miles from Bakersfield and about 17 miles from Taft. She could not identify specifically the person who rented the box but testified that he has a fair complexion and

looked tall to her since she was only 5 feet 2. [Rep. Tr. 153-161.]

Mrs. Werling had testified that the person who rented the box originally re-rented it for one year on July 17, 1957. She was later recalled [Rep. Tr. 437-439] since the records to which she had referred contained the date of July 15, 1957, rather than July 17. The witness explained that she had apparently looked at the receipt below it which contained the date of July 17.

Mary F. Gray, the clerk in charge of the Poplar Rural Station out of Porterville, California, was later called by the government with respect to the rental of a post office box. This was a contract station where post office boxes are rented to the public. Mrs. Gray made out Exhibit 32 herself, which is a receipt for post office box 451 in that station. It was rented on January 29, 1958 up to June 30, 1958. Mrs. Gray identified the appellant, John Russell Hanson, as the person who rented the box in the name of either Sidney or Stanley Jones. The witness made a mistake on the post office box number and endeavored to find appellant to advise him of the mistake, but could not locate him. Since appellant had told her he was going in the trucking business she asked around town if anyone knew someone who was going in the trucking business but she could not find him. About a month later, appellant came into the station and she called him by name of "Mr. Jones," informing him that she had put the wrong box number on the receipt. At that time appellant got the receipt out of his pocket and they had a conversation with respect to the mistake. Mrs. Gray then asked him questions about the fact he had told her he was going in the trucking business and that she had not been able

to locate him. This was about a month after January 29, 1958. [Rep. Tr. 282-291.]

After Mrs. Werling was called, the government called Florence K. McCown, who was chief of the Returns Index and Service Section of the Internal Revenue Service. She testified with respect to the W-2 forms which are required to be attached to each return that comes in to the Service to be prosecuted. She stated that, with respect to the 1040-A returns which were involved in this case, the W-2 Form had been sent to the Mid-West Service Center and would not be available to any one, including the United States of America, until approximately September of 1959.

The remaining seven witnesses called on November 19, 1958, by the Government were employees of certain banks located in Bakersfield, Oildale and Taft, California. Mr. Merle Fisher was the assistant cashier at the East Bakersfield Branch of the Bank of America. He stated that East Bakersfield is about a mile and a half from Bakersfield and approximately 42 miles from Tehachapi. His testimony primarily involved Government's Exhibit No. 27 which was comprised of a sheet called "Statement of Account" and certain attachments composed of deposit slips, and application card for an account, and three personal checks, and also Government's Exhibit No. 3 which was the Treasury check in the name of Walter Adams.

Exhibit No. 27 involved an account which was opened in the name of "Walter Adams," Post Office Box 916, Tehachapi, California. According to the procedures in the bank the two signatures in the name of "Walter Adams" on the application card were required to be placed thereon

by the applicant at the time the account was opened. This account was started with a cash deposit of $48.50 on June 6, 1958. [Rep. Tr. 171-172.] The witness testified that the statement of account showed a $35.00 check payable to cash and drawn by the customer was cashed in the bank on June 9, 1958, and on June 12, 1958, there was also a similar check for $100 cashed. Further, on June 10, 1958, another $200 personal check was cashed. The person who had the account received a total of $335 for the personal checks. They were all made out in similar fashion and handwriting.

The witness related Exhibit No. 3, the Treasury check payable to Walter Adams, Post Office Box 916, Tehachapi, California, for $290.10, to the Statement of Account in that the sum of $290.10 was posted on the Statement of Account as a deposit on June 10, 1958. A teller's stamp from that bank was on the reverse side of the Treasury Check showing a deposit of that check on June 10, 1958. It should be noted that the deposit of the Treasury check took place on the same date when the personal check for $200 was cashed. The personal check for $100 was cashed two days later. At the end of the transactions there was $3.60 left in the account on June 12, 1958. There were no further transactions since that time and those were the only transactions shown on the account. This witness did not make personal identification of the applicant who opened the account. [Rep. Tr. 173-176.]

Sidney E. Bishop testified primarily with respect to Government's Exhibit No. 28, which was similar to Exhibit No. 27 in that it contained a Statement of Account, deposit slips, personal checks and other material in the

name of Allan J. Jones, Box 304, Glennville, and also as to Government's Exhibit No. 2 which was the Government's Treasury Check in the name of Allan J. Jones, box 304, Glennville. Mr. Bishop was the Chief Clerk of the Crocker-Anglo National Bank, Oildale, California, and he stated that the documents in Exhibit No. 28 were made out in the bank in the ordinary course of business. He testified as to the general nature of the documents in that exhibit and said that the signature Allen Jones on the application card was made by the applicant for the account. He further testified that "Jackie Price" was the "new account" girl who opened the account [Rep. Tr. 179-182].

The initial deposit in the account was in the amount of $48.50 and it was opened on June 10, 1958. On June 12, 1958, Exhibit No. 2, the Treasury check for $270.50 payable to Allen J. Jones, was desposited in the account since the bank's markings were on the check [Rep. Tr. 183].

Also on June 12, 1958, the customer's check made out to "cash" for $35 was paid in cash at the bank against the account; also a check for $200. The two checks were attached to Exhibit No. 28, and were both in the name of Allan J. Jones, made out in similar handwriting and manner. The Government check had to have indorsement of the so-called payee on the reverse side thereon, when deposited. On June 16, four days later, a similar personal check for $80 was also cashed in the bank and a balance was left of $4 in the account. There was no activity since and the above transactions were all that were shown in the account [Rep. Tr. 184-185].

There was no personal identification of the applicant from this witness.

Jackie Price testified next, being employed by the Crocker-Anglo National Bank, in Oildale, California, as was the case of the last witness, in the capacity of New Accounts Clerk and stenographer. She testified as to the procedure in opening new accounts which involved the applicant signing the signature card. The applicant personally appeared when she opened the account and signed it. She testified as to what happened when this particular customer came in and opened an account in the name of "Mr. Allen J. Jones" [Rep. Tr. 189-192]. She also described the man as approximately 5 ft. 10, light brown hair, and fair complexion. The applicant appeared to have his right hand wrapped up in a gauze dressing with tape around it. He wrote his name on the application with his left hand. Since he wrote so well with his left hand, Miss Price asked the applicant if he was left-handed or right-handed and he told her that he was right-handed. However, he said he could write with either the right or left hand. The applicant also told her that he had had an accident. She also stated that the man kept putting his left hand, which was not bandaged, to his face and that he also kept his head down. She had never seen the man before and she did not see him after the application was made out [Rep. Tr. 192-196]. Although this witness generally described the person who made the application she was not able to recognize him at the time of trial [Rep. Tr. 208]. However, she did testify that the person who sat down and wrote out the application for the account in Exhibit No. 28 did bear a resemblance to the defendant, John Russell Hanson. However, she was unable to say that appellant was "definitely him". In other words, she did not have a positive picture of him in her mind [Rep. Tr. 211].

The next witness was Edward Plummer, Jr. Assistant Manager of the Crocker-Anglo National Bank in Taft, California. His testimony primarily concerned Exhibit No. 29, which was a sheaf of documents similar to Exhibits 27 and 28, that is, a statement of account, deposit slips, personal checks, etc., in the name of Peter Hall, at Box 1162, Taft, California, and also Exhibit No. 1, which was the Treasury check in the name of Peter Hall, Box No. 1162, Taft, California. Mr. Plummer testified that a Mr. Marvin Evans also worked in the bank for him, and that Crocker-Anglo National Bank was about a block away from the Bank of America in Taft. Mr. Plummer testified that the signature on the signature card required from all persons opening accounts in the bank was placed there by the person opening the account. Also, on the reverse side of the card the first four lines relating to personal information had to be filled out by the same person. He also testified that the ledger sheet contains the signature of the person who opens the account. All of the documents in Exhibit No. 29 were made out in the ordinary course of business of the bank [Rep. Tr. 212-214]. This witness testified that the records in Exhibit No. 29 showed that on June 12, 1958, a person who stated he was Peter Hall came into the bank and opened the account with a deposit of $38.50. The next transaction was on June 13, 1958, when the deposit of a government check in the amount of $296.20 was made. He knew it was a government check by a number on the deposit slip and also that it was Exhibit No. 1 by examining that Exhibit for the bank indorsement dated July 13, 1958. After the credit of $296.20 from the Treasury check was deposited to the account, on the same day "Mr. Hall" wrote

out a personal check to cash in the amount of $250, which was posted as a debit to the account. In other words, the customer got $250 in cash in the bank [Rep. Tr. 215, 216].

The government check contained an indorsement on the reverse side in the name "Peter Hall" which would have been on it before it was taken in by the bank for deposit.

After the $250 personal check was cashed, and the Treasury check for $296.20 deposited on June 13, 1958, another transaction took place. On June 17, 1958, "Mr. Hall" cashed a similar personal check for $80 in the bank and received the money therefor. That reduced the balance in the account to $4.17. That was the last transaction in the account. The above transactions were the only ones which were shown to have occurred [Rep. Tr. 216-218]. Mr. Plummer testified that he recalled seeing the person who opened the account. He described him as about of average height, with a slender build. The person also had his right arm in a cast and in a sling. However, Mr. Plummer did not remember the applicant's face. He did recall that the man used his left hand in signing the signature card [Rep. Tr. 218-219].

The person who opened the account told Plummer that he had been in an accident. Plummer testified that he could not recollect what the person looked like. That person could have been in the courtroom but Plummer would not be able to recognize him if he were [Rep. Tr. 221, 222]. He said that in writing with his left hand the person appeared to be skilled in writing with that hand [Rep. Tr. 222].

Mr. Marvin Evans, from the same bank in Taft, testified next. He worked under Mr. Plummer, assisting in

the supervision of operations. His testimony primarily concerned Exhibits No. 29 and No. 1 [Rep. Tr. 226]. Mr. Evans took the deposit of the Federal check and "turned right around and cashed the check for Peter Hall. He had a special check already made out and cashed it." This was on June 13, 1958. "Peter Hall" also handed Evans the deposit slip dated on the same day. All that Evans put on it was the bank number. He identified appellant as the man who had handed him the deposit of the Federal check with the deposit slip and then cashed the personal check for $250 [Rep. Tr. 226-228]. This was on a Friday and it was after 3 o'clock [Rep. Tr. 228-229, 233, 234]. Evans further testified that on June 13, "Peter Hall" had all the papers made out before he came to the window. At that time he was not wearing a sling [Rep. Tr. 236-237]. The Exhibit shows that on June 17, 1958, there was a balance of $4.70 left in the account.

During cross-examination, redirect examination and recross-examination the witness was interrogated with respect to subsequent conversations he had had with certain law enforcement officers regarding the identity of the alleged "Peter Hall". It was brought out that at that time Mr. Evans picked out a photograph of the appellant as the person who had deposited the government check and cashed the personal check at the time Mr. Evans dealt with him. This photograph was received as government's Exhibit No. 30. Counsel for defendant stated that he had no objection to the photograph going into evidence [Rep. Tr. 247-250].

The next witness was Lorraine Hunt, Assistant Cashier for the Bank of America, also located at Taft, Calif.,

this was the bank which was a block away from the Crocker-Anglo Bank in the same town (and 40 miles from Bakersfield, according to the witness Hanna). Her testimony primarily related to government's Exhibits No. 31 and No. 4. No. 31 was similar to Exhibits 27, 28 and 29, containing a sheaf of documents including the statement of account, personal checks and deposit slips in the name of Joseph J. Cook, Box 235, McKittrick. Exhibit No. 4 was the Treasury check relating to Joseph J. Cook, Box 235, McKittrick, California. The documents in Exhibit No. 1 were made in the regular course of the bank's business [Rep. Tr. 253, 254, 255].

Only the signature of the applicant for the account of Joseph J. Cook was in the handwriting of that person. Other writing on the application card with reference to address, business and other personal information was that of Pauline Carlton, the bank employee [Rep. Tr. 256].

The $40 deposit shown on the ledger sheet was the amount of the initial funds which started the account on June 12, 1958. On June 13 there was a check deposited by "Joseph J. Cook" for $267.40. Exhibit No. 4, the Treasury check for $267.40, was the check which was deposited on June 13 in that account [Rep. Tr. 257]. The handwritten indorsement on the reverse side of Exhibit No. 4 of "Joseph J. Cook" had to be placed on the check before it was deposited in the account. That deposit increased the balance. On the same day, however, there was a check payable to "cash" was cashed by "Joseph J. Cook" for $225 in the bank. That personal check was part of Exhibit No. 31 [Rep. Tr. 258, 259]. In other words, the teller paid "Joseph J. Cook" $225 in cash which was deducted from the amount in the account. The

next thing that happened was that on June 17 a similar check for $80 was cashed by "Joseph J. Cook" at the bank, $80 cash being paid to that person. That was the last transaction that occurred and there was $2.40 left in the account at that time. There were no further transactions. All of the activity in the account was that mentioned above [Rep. Tr. 259-260].

The next witness was Pauline Carlton who worked in the same bank as the Collection and New Accounts Teller [Rep. Tr. 261, 262]. Mrs. Carlton, referring to Exhibit No. 31, opened that particular account for "Joseph J. Cook". He came to the window and she noticed that his right hand was "all wrapped up". It was a gauze covering which went at least to the end of his shirt sleeve. The man told her that he had had an accident so she filled out the back of the card for him and gave it to him to sign. She asked him if he could sign all right with his left hand and he replied, "Oh, yes. I can write as good with one hand as with the other." She then watched him and "he wrote so slow and it was so pretty. I laughed and told him that he should write with his left hand all the time." She then requested him to come in and sign a new signature card when his right arm got better and he said he would. However, he did not come in and do that.

Mrs. Carlton identified appellant as the man who came in on the occasion she described and opened the account [Rep. Tr. 263, 265].

The witness later testified that a government law enforcement officer had shown her four pictures and one of them was Mr. Hanson. The other three pictures were other persons [Rep. Tr. 273].

The next day, November 20, 1958, the government called Mary F. Gray, the clerk in charge of the Poplar Rural Station out of Porterville, Calif., as indicated above. She also identified the defendant as the man who opened postoffice box 451 in either the name of Sidney or Stanley Jones at an earlier date [Rep. Tr. 282-291].

The next witness for the government was Joe McGlocklin, a Claims Adjuster for the Automobile Club. He testified that the defendant, John R. Hanson, was insured by his company at one time [Rep. Tr. 291-292]. Government's Exhibit No. 33 was an accident report showing that appellant had an accident on or about April 28 of 1958, a one-car collision in which he rolled off the road [Rep. Tr. 293].

The next witness was Doctor Ray D. Kohl, an osteopathic physician and surgeon. John Russell Hanson was a patient of his on May 1, 1958. The doctor saw him five times subsequent to that date, on May 5, 6, 19, 26, and June 11. On May 1, appellant came into the doctor's office with a plaster cast on his right forearm and the witness removed it on May 6. Thereafter, on that date he placed a "Yucca board splint padded with cotton on both sides of the arm, bandaged with gauze and adhesive tape" on appellant's right arm. Appellant did not return the splint to the witness.

In the opinion of the witness it was possible for Mr. Hanson to remove the splint from his right arm himself and also to reapply the splint on that arm by himself [Rep. Tr. 304-307]. The witness later testified that he took an X-ray picture and could see that there is a very small fracture on the right arm "on the medial edge of the distal end of the radius" [Rep. Tr. 308-309].

Before the trial had started, on October 24, 1958, counsel for appellant made a motion for the appointment of a handwriting expert under Rule 28 and nominated Mr. David Black who was then present in court as the expert. The Court granted the motion and appointed Mr. Black [Rep. Tr. 19, 20]. Arrangements were then made to give the documents which the government intended to offer in evidence to Mr. Black for his examination before the trial [Rep. Tr. 21]. The government indicated that the documents consisted of application cards, checks, four Treasury checks and ledger cards; about fifty documents altogether [Rep. Tr. 22]. The defense also offered to provide exemplars of Mr. Hanson's handwriting for examination by the court-appointed expert and arrangements were made for the defendant to do so. The Court stated that "the defendant, of course, is not under any compulsion to give an exemplar. He doesn't have to do it, but I understand through his counsel he was offering to do so" [Rep. Tr. 26-28].

During the trial of the case David A. Black, the above-appointed handwriting expert, was called by the government [Rep. Tr. 309]. At that time the exemplars given to Mr. Black by the defendant were marked as Exhibits 34 to and including 49 [Rep. Tr. 310, 311].

Mr. Black testified that all of the handwriting on Exhibits 34 to 49 was placed thereon by the appellant with the exception of certain notations which Mr. Black had made. The writing by appellant appeared in blue ink whereas the notations made by the expert were in black ink. Most of the wording written by appellant on the exemplars involved the names and other written material that appeared on all the other documents which were

placed before the witness. The exhibits were given to Mr. Black to examine on October 27, 1958, and later that afternoon he had the exemplar samples written by Mr. Hanson [Rep. Tr. 311-316].

Mr. Black testified that he had examined Exhibit No. 24, the Post Office application for Taft, California, and Exhibit No. 22, the Post Office application in the name of Walter Adams and had also examined the signatures on the income tax returns, the endorsement of the payees on the reverse side of the Treasury checks, the writing and signatures on the personal checks and the applications for bank accounts [Rep. Tr. 324, 325]. Mr. Black stated that, without comparison with the writings of Mr. Hanson, he had come to the conclusion that the same person wrote all of the signatures on those Exhibits [Rep. Tr. 325, 326]. He reserved for later discussion Exhibit No. 24, the Post Office application at Taft where the signature of applicant appeared as "Peter Hall" [Rep. Tr. 324-326].

Specifically, Mr. Black testified that the signatures of Peter Hall, Sidney Jones, Sidney J. Jones, Stanley Jones, Walter Adams, James Adams, Joseph Cook, Kenneth Cook, Joseph J. Cook, William Hall, William H. Hall, James Jones, Allan Jones and Allan James Jones, on the income tax returns, were all written by the same person. He also testified that the person who had written those signatures was also the person who had written the endorsement signatures on the four government checks. Exhibits 1 through 4, in the names Peter Hall, Walter Adams, Allan J. Jones and Joseph J. Cook [Rep. Tr. 327]. Mr. Black also testified with respect to Exhibits 27,

28, 29 and 31 that the same person who wrote the above-mentioned signatures on the income tax return forms and on the government check endorsements also wrote the name Peter Hall on Exhibit 29 on the pink signature card and on the ledger sheet and in the lower right-hand corner of two checks, one dated June 13 and the other dated June 17, 1958. (In addition to that, Mr. Black reached the conclusion that the same person wrote other wording on the back of the pink signature card.) This person also wrote that signature on the top of the deposit slip dated June 13, 1958, and the general body writing appearing at the top of the deposit slip dated June 13, 1958, and certain figures on the deposit slip. That same person also wrote the body writing on the face of both checks attached to that Exhibit.

With respect to the documents in government's Exhibit 28 relating to "Allan J. Jones," Mr. Black reached the conclusion that the same person who wrote all of the other material on the "Peter Hall" Exhibit No. 29, wrote the signature "Allan J. Jones" on the pink signature card. Mr. Black testified that the same person wrote all the writings appearing on the face of the three checks in Exhibit 28 and a signature appearing in a carbon copy on a pink bank reference request "Allan J. Jones."

Mr. Black gave similar testimony with respect to government's Exhibit 31 in connection with the signature "Joseph J .Cook," particularly with respect to the cancelled bank checks. His opinion with respect to that Exhibit also included certain signatures and other writing on the bank deposit slips.

Similar testimony was also given with respect to the bank records comprising Exhibit No. 27 in the name of "Walter Adams". Mr. Black reached the conclusion that the same person who had written all of the other signatures and writing which he had spoken of in connection with Government's Exhibits 29, 28 and 31, the bank records, had written the signature "Walter Adams" in two places on a bank signature card, as well as other writing on that part of the exhibit. That person also wrote the face of the three checks and a signature and other writing on a deposit slip [Rep. Tr. 324-332].

Mr. Black further testified that the same person who wrote all of the other writing which he had set forth also wrote the signature "Walter Adams" in the lower lefthand corner of the Post Office application card for Box 916 at Tehachapi, California [Rep. Tr. 332, 333].

In other words Mr. Black testified that with respect to the four groups of bank records, all of the writing which he enumerated thereon had been written by one and the same person. He said that it was a "stylized form of writing" and had "some of the appearances of an unnatural writing or a feigned or disguised writing". He stated that in his opinion the writing was written "more slowly than the average throughout" [Rep. Tr. 334, 351, 374] and it is possible for a person to disguise his writing [Rep. Tr. 335]. Mr. Black then wrote his own signature in the presence of the jury in his normal fashion twice and rewrote his signature twice in a manner in which he felt could not be compared to his natural handwriting by another expert [Ex. 52, Rep. Tr. 430]. He testified that the two natural writings could be matched or identified

as having been written by the same person and that the two signatures which were disguised could be identified as having been written by the same person by another handwriting expert. However, he testified that he could not expect another expert to identify the person that wrote the two unnatural writings as the same person who wrote the natural writings. However another expert could give an opinion that it was possible for the same person to have written all four signatures; that it was within his "penmanship ability" [Rep. Tr. 336-338].

Mr. Black then testified that he was not able to identify the writer of the exemplars, that is appellant, on Exhibits 34 through 39 as the writer of any of the stylized writing in the questioned documents. However he testified that in his opinion the handwriting of Mr. Hanson was of sufficient skill that he could have written the stylized samples of the questioned writings [Rep. Tr. 339, 340].

Mr. Black did testify, with respect to the signature "Peter Hall" on the face of the Post Office application, which was Government's Exhibit No. 24, that comparing it with the exemplar writings taken from Mr. Hanson, he reached the conclusion that the same person who wrote the exemplars wrote the signature "Peter Hall" on the face of Exhibit 24 [Rep. Tr. 340].

The witness further stated that although the handwriting on the 1040A forms and the handwriting on the bank exhibits appeared to be different to a layman than the signature "Peter Hall" on Exhibit 24, it was his opinion that the same person could have written all of those signatures and the signature on Exhibit 24 [Rep. Tr. 341].

With respect to the handwriting on the bank exhibits, which Mr. Black had testified were written by the same person, and the signatures on the 1040-A forms, Mr. Black said that it was his opinion that the signatures on the 1040-A forms were written by the same person who wrote the specified writing on the exhibits comprising the bank documents [Rep. Tr. 341, 342].

Mr. Black also reached the conclusion that the same type of writing instrument, a ball pen containing the same identical shade of light purplish blue ink was used to write the indorsement signatures on the back of all four government checks, Exhibits 1 through 4, and on certain of the other documents in the Peter Hall bank papers, Exhibits 29, Allan Jones, Exhibit 28, Walter Adams, Exhibit 27 and Joseph Cook, Exhibit 31. Mr. Black further came to the conclusion that all of the typing on the 1040-A forms were made by an L. C. Smith pica type standard office model machine of the period of manufacture 1911 to 1933. He believed that all of those forms were typed on the same individual machine [Rep. Tr. 342-344].

The witness testified that it is possible physically that a person could write in the typical, shakey, left-handed writing as shown on Exhibits 44 through 49, and yet cultivate and write in a fashion as represented by the stylized writing which he testified to in the other exhibits [Rep. Tr. 346-348].

Mr. Black testified as to the similarity in which the personal checks, which were cashed through the four bank accounts, were written [Rep. Tr. 349, 350].

It was testified that the witness had no way of knowing the extent of appellant's skill in penmanship with his left

hand, except to the extent that the documents which the defendant wished to give him revealed it. In other words, Mr. Black had no way of knowing the actual capabilities that the defendant had in writing with his left hand [Rep. Tr. 371, 372].

Mr. Black was excused temporarily and the next witness was Laurence W. Sloan, an examiner of questioned documents employed by the Los Angeles Police Department [Rep. Tr. 383, 384]. His testimony primarily involved the income tax returns, Exhibits 5 through 18, the four groups of bank exhibits and the Treasury checks, Exhibits 1 through 4. Mr. Sloan testified, in effect, that principally with respect to the signatures "Peter Hall", "Allen J. Jones", "Walter Adams" and "Joseph J. Cook", that the writings were all made by the same person [Rep. Tr. 385, 387].

He also included in his opinion the writing of the name "Walter Adams" in Exhibit 22, the Post Office application [Rep. Tr. 387].

He further testified that the style of the writing he had referred to was an "affectation", a kind of handwriting that was not taught in the schools of the United States [Rep. Tr. 388].

Mr. Sloan testified that it is customary for a person who is not ambidextrous, when he writes with his left hand, to produce a very poor result. However, depending upon the ultimate gain in mind, it is possible for such a person, through practice, to improve that left-handed writing. Further such a person could then be capable of writing two kinds of left-handed writing, good and poor [Rep. Tr. 391, 392].

He also testified that after having examined the exemplars given by the defendant and the stylized writing on the bank exhibits, the 1040-A forms and the payee's indorsement on the checks, that the person who wrote the exemplars was capable of writing the questioned hand writing [Rep. Tr. 394, 396].

Mr. Sloan then testified with respect to Government's Exhibit No. 24, the Post Office application containing the signature "Peter Hall" in the middle of the form. He stated that it was his "specific and unqualified opinion that the person who wrote the name Peter Hall, as it appears in the middle portion of the front part of Exhibit 24, is the same person responsible for the right-handed exemplar writing on the yellow sheets of paper beginning with the Exhibit No. 34" [Rep. Tr. 397, 398]. In comparing the name "Peter Hall" on Exhibit 24 with the stylized writing of the name "Peter Hall" in the bank exhibits and on the reverse side of the checks, he gave the qualified opinion that the person who wrote the signature "Peter Hall" on the exhibits bearing that signature, could have written the kind of writing of "Peter Hall" on Exhibit 24 and "that person could certainly be the person doing the right-handed writing of Mr. Hanson" [Rep. Tr. 398, 399].

On November 21, 1958, Mr. Black resumed his testimony. After he started and while he was on the stand the defendant made out some exemplars in the presence of the jury which were marked as defendant's Exhibit B and C. Government counsel then requested the defendant to make some other writing, very slowly, in the presence of the jury. This was done and it was marked as Government's Exhibit No. 51 [Rep. Tr. 412-419].

Mr. Black then compared the Government exhibits comprised of the bank documents, 27, 28, 29 and 31, and testified that it was possible that Mr. Hanson could have written the material on the four groups of papers [Rep. Tr. 424-426]. He further testified after having looked at the exemplars made out by the defendant in the presence of the jury, that the signature "Peter Hall" on Exhibit No. 24, the Post Office application, was representative of the defendant's natural and normal right-handed handwriting [Rep. Tr. 427]. He further said that it was possible the person who wrote the "Peter Hall" on Exhibit 24 also wrote the writing on the bank exhibit relating to "Peter Hall" [Rep. Tr. 428, 429].

On November 25, after the Government had rested, the appellant put on his case. The Controller for Capitol Records at Los Angeles testified with respect to two time cards for employees, one for Beulah Hanson and one for Mabel Parks. They were marked as defendant's Exhibits D and E. Beulah Hanson then took the stand and testified that she was appellant's wife. She testified in effect that she and her husband were working on their house during the early part of December 1957 and certain bills were marked as defendant's exhibits in connection with the purchase of paint, shellac, etc. [Rep. Tr. 447-450].

Mrs. Hanson only testified as to one other occasion, Friday, June 13, 1958. She testified that her husband had taken her to work on that day. "He wanted to go fishing that night so he wanted the car" [Rep. Tr. 451]. (The previous witness had testified that her time clock showed Mrs. Hanson had clocked in at work on Friday, June 13, 1958 at 18 minutes after 3 [Rep. Tr. 443, 444]).

On cross-examination Mrs. Hanson testified that there were times when her husband was gone from home [Rep. Tr. 454]. And that on some occasions he had slept in his car outside of the Vagabond Restaurant where he worked in 1958 up to April 11, 1958 [Rep. Tr. 455]. On April 14, 1958, her husband left on a trip and was gone two or three weeks. When he left she did not know where he had gone and she did not hear from him until he was on the way home and he had an automobile accident on that occasion [Rep. Tr. 457, 458]. Her husband was largely unemployed from April 11, 1958 until he went to Yellowstone National Park to work as a cook on June 18, 1958 [Rep. Tr. 457-459].

The next witness for the defense was a job dispatcher for the Cooks Union in Los Angeles. He claimed that on June 17, 1958 appellant was interviewed by a Chef who came in to hire a couple of cooks in the Union [Rep. Tr. 460-462]. However on cross-examination he stated that the appellant was in the Union just before lunch, about eleven o'clock A.M. appellant then left before noon. He had the record of two other men he saw that day but had no records relating to seeing appellant on the same date [Rep. Tr. 465-467].

The next witness was Mabel Parks who also worked at Capitol Records and was a friend of the Hansons. She testified that she had seen the appellant on June 13, 1958 at his house. She claimed to have seen him between ten

o'clock in the morning and the time she was on her way to work [Rep. Tr. 470-473].

There were no further witnesses for the defense which rested after the last witness testified [Rep. Tr. 474].

Argument was then made by counsel for the Government and the defendant. The parts of the argument which are pertinent to an issue in the opening brief will be set forth in the argument herein.

On December 5, 1958, after the defendant had been convicted on November 28, 1958, he was sentenced by the Court. The Court commented that the probation report indicated the defendant had served a term in the State Prison at Huntsville, Texas, for assault with intent to commit robbery and that he had served a term in the State Prison in Arizona for grand theft. Appellant was also then on probation for forgery of a government check, which conviction occurred in 1955 before Judge Clark of the United States District Court for the Southern District of California [Rep. Tr. 613, 614]. After the Court stated that the "circumstances of the case are aggravated" and "if the Court imposed the maximum penalty it would run to in excess of 100 years", the defendant was sentenced to a total of approximately 28 years on 21 counts of the indictment.

IV.
ARGUMENT.

(1) The Court Lacks Jurisdiction on Appeal.

The record shows conclusively that the Judgment and Commitment was filed on December 5, 1958, the same day sentence was imposed on appellant [Clk. Tr. 26]. It is obvious that the Judgment and Commitment was actually entered on December 8, 1958 since the notation "12/8/58" immediately follows the designation of the terms of the Judgment. All of this was in typewriting. In other words, the entry of the Judgment was an accomplished fact on December 8, 1958. On that date the time for the filing of the Notice of Appeal commenced to run under the provisions of Rule 37(a)(2) of the Federal Rules of Criminal Procedure, which provides that "an appeal by a defendant may be taken within 10 days after entry of the Judgment or order appealed from, * * *"

Subsequently, on December 12, 1958, when appellant still had approximately 6 days within which to file his Notice of Appeal from the date of the entry of the Judgment on the Criminal Docket Entries, the Court made an order that the Judgment be entered on December 15, 1958. However, as indicated above, the Judgment had already been entered on the 8th. No order was attempted to be made invalidating the prior date of entry. It was not a purported *nunc pro tunc* entry, "now for then". If it had been, it would not have been valid as the proper function of such orders is to correct the record so it speaks the truth, or to show a previously unrecorded order.

Wilson v. Bell, 137 Fed. 716 (6 Cir., 1943).

The Notice of Appeal was filed by appellant on December 24, 1958 [Clk. Tr. 27]. This date was obviously outside of the ten day period from December 8, 1958, the true date of entry.

Thus, it appears that this court may not have jurisdiction to consider the appeal because of a late filing of the Notice.

Counsel for appellee has been unable to find any case which involves a situation similar to the above events with respect to the filing of the Notice of Appeal. However, it is axiomatic that the time limitation contained in Rule 37(a)(2) is mandatory and jurisdictional. A jurisdictional defect results when the appeal is filed too late and the case must be dismissed.

United States v. Froehlich, 166 F. 2d 84 (2d Cir., 1948);

Wagner v. United States, 220 F. 2d 513 (4th Cir., 1955).

In the *Wagner* case, the Court remarked:

"Appellant is not hurt by the dismissal, however, as we have examined the record on appeal and find that the points on which he relies are without merit."

See also:

United States v. Isabella, 251 F. 2d 223 at 225 (2d Cir., 1958).

In *Richards v. United States,* 192 F. 2d 602 (Dist. of Col., Ct. of App., 1951) the Government contended that the Court of Appeals lacked jurisdiction because the appeal was not taken "within ten days after entry of the judgment or order appealed from * * *", as required by Rule 37(a)(2). In that case the Criminal Docket of the

District Court contained two entries, one showing June 16, 1950 as the date of sentence and the other showing "June 19, 1950—Judgment and commitment of 6/16/50, filed. * * *" The Notice of Appeal was filed on appellant's behalf on June 27, which was more than ten days after June 16. The Government contended that June 16 was the crucial date. The Notice of Appeal was filed within ten days after the 19th.

The Court stated that the Notice of Appeal was timely and went on to say:

> "The expression 'entry of the judgment', as used in Rule 37(a)(2), is not defined or explained by the Criminal Rules, nor have we found any decisions interpreting the rules in this regard. * * * The formal document reflecting the judgment and commitment in the present case, signed by the Judge, begins with the recital 'On this 16th day of June, 1950 * * * it is adjudged * * *,' and bears no other date. The Judge may well have signed it on that day; perhaps we may even presume that he did so. June 16th was, of course, the day on which Richards was sentenced in open court. But the clerk did not make any record of the signed judgment on the criminal Docket until June 19th, when he made the entry 'judgment and commitment of 6/16/50 filed. * * *' We think that this was 'the entry of the judgment' of which Rule 37(a)(2) speaks. Decisions of the Supreme Court prior to the promulgation of the Rules, though not controlling, lend support to this view. * * * Other persuasive authority, though likewise not strictly in point, looks in the same direction. * * *"

The Court shortly thereafter remarked that the conclusion made was favorable to the remedy of appeal "a remedy we are not inclined to undervalue".

This Honorable Court in *Crow v. United States,* 203 F. 2d 670 (9th Cir., 1953), stated at page 671:

> "Rule 37(a)(2) of the Federal Rules of Criminal Procedure provides: 'An appeal by a defendant may be taken within ten days after entry of the judgment or order appealed from, * * *' Hence the period within which appellant might have taken a valid appeal from the order here appealed from was ten days after entry of the order, which is to say, ten days after December 11, 1951".

The date of December 11, 1951 was, according to Judge Mathews, the date that the order involved was entered. That appeared from the Supplemental Record in the case.

It thus appears fairly certain that the word "entry" in the Rules means the date on which the clerk actually enters the Judgment and Commitment in the docket entries. In this case it appears that the entry was made on December 8, 1958, although the Clerk endeavored to change the date later in ink, pursuant to the Court's order of December 12, 1958. However, the change which was made could not alter the fact that the entry had actually been made on December 8, 1958; and not on December 15, 1958.

This Court again considered the entry of Judgment in *Lee v. United States,* 238 F. 2d 341 (9th Cir., 1956) and based its decision on the fact that the Supplemental Record showed the true date of entry, rather than the date shown as a notation on the Judgment itself.

In writing the opinion Judge Mathews stated:

> "Thereupon, on January 11, 1956, the District Court rendered a judgment sentencing appellant to be imprisoned for five years and to pay a fine of $10,000 and the cost of prosecution. The judgment was filed and entered on January 12, 1956. * * *"

In a footnote to that statement the following is shown:

> "Appended to the judgment is the following notation: 'Entered January 13, 1956'. Actually, however, the judgment was entered on January 12, 1956. This appears from the supplemental record filed here on September 20, 1956."

It is clear that the Court in the *Lee* case ignored the notation on the Judgment of the date of entry to consider the true date of entry as it appeared from the Supplemental Record. It is felt that the court should do likewise here and consider the true date of entry as December 8, 1958. If such be the case, it would follow that the time for filing the Notice of Appeal commenced to run from the date of December 8, 1958 and not from December 15, 1958.

Appellee calls the court's attention to the case of *Spriggs v. United States,* 225 F. 2d 865, one of the few cases to be found in which an entry has been set aside. However, in that case the reason for setting the entry aside was apparently "to conform to the true pronouncement". Such was not the case in the within matter.

The case of *Rosenberg v. Heffron,* 131 F. 2d 80, at p. 82, (9th Cir., 1942) contains some language which may be of interest to this Court. However that case was a civil matter involving an appeal in a bankruptcy case. Judge Mathews writing the opinion held that an appeal was in time where an order was noted in the Docket on May 5, 1942, and the appeal was taken on June 4, 1942. This was true since the Clerk's pre-dated notations did

not constitute the entry of the order of affirmance. The Court stated:

> "We conclude that in bankruptcy cases, as in civil actions generally, the notation of a judgment, order or decree in the Docket constitutes the entry thereof. The order here appealed from . . . the order affirming the Referee's order of May 15, 1941 . . . was noted in the Docket on May 5, 1942. That notation constituted the entry of the order.
>
> "On June 10, 1942 . . . 36 days after the order was entered and six days after this appeal was taken . . . the following notation was made in the Docket: 'Apr. 20 Fld. Memo. of Conclusions. Ent. Min. Ord. Conf. Referee Ord. of 5-15-41. Counsel to Prep. Order'. This pre-dated notation did not constitute the entry of the order; for, as shown above, the order was entered long before the pre-dated notation was made."

The record on this jurisdictional point contains no explanation as to why the Court made the order of December 12, 1958, endeavoring to have the Judgment entered on December 15, 1958. The appellant still had a number of days from December 12, 1958 within which to file his Notice of Appeal and there is no provision in Rule 37 regarding extensions of time to file Notices of Appeal. Rule 45 does not apply to a Notice of Appeal. The order of the 12th was not an attempt to make a correction of a judgment, *nunc pro tunc* as in the case *Bledsoe v. Johnston,* 154 F. 2d 458 (9th Cir., 1946), nor could it have been done for the purpose of delay because the matter was under submission to the Court as in *Taylor v. Walker,* 6 F. 2d 577 (4th Cir., 1925).

It is thus submitted that when there is no valid reason shown of record for the making of such an order, such

as the correction of error, the actual date of entry of the Judgment should be used for computing the time within which a Notice of Appeal could be filed. Otherwise, the time for filing a Notice of Appeal could be extended indefinitely, which would be contrary to the terms and policy of the rule which strictly limits the time for filing appeals.

Ordinarily the Government would be constrained to maintain a view "in consonance with an approach which is favorable to the remedy of an appeal, *Richards v. United States,* 1951, * * * 192 F. 2d 602 * * *", *Chambers v. District of Columbia,* 194 F. 2d 336, but it is difficult to see where such a view is warranted here where the Court's order attempted to un-do something already done, in a situation where there was no inadvertence or correction of the terms of the judgment or of the Clerk's entry itself to be made.

(2) No Error Was Committed by the Trial Court by the Method Used in Exercising Peremptory Challenges.

The Supreme Court of the United States has approved the identical method of exercising peremptory challenges used by the trial court in this case. In *Pointer v. United States,* 151 U. S. 396, the panel of the petit jury was called and the jurors were examined as to their qualifications. Thirty-seven were found to be qualified and the defendant and the government were then each furnished with a list of the thirty-seven jurors selected. The parties were required to make their respective challenges, twenty by the defendant and five by the government, the remaining first twelve names not challenged to constitute the trial jury. The defendant at the time objected to this way of selecting a jury on four grounds: First, because it

was not according to the rule prescribed by the laws of Arkansas; second, because it was not the rule practised by common law courts; third, because the defendant could not know the particular jurors before whom he would be tried until after his challenges had been exhausted; fourth, because the government did not tender to the defendant the jury before whom he was to be tried, "but tendered seventeen men instead of twelve, and made it impossible for defendant to know who the twelve men before whom he was to be tried were until after his right to challenge was ended."

The Supreme Court affirmed the judgment below stating: "We perceive no error in the record to the prejudice of the substantial rights of the plaintiff in error."

The Court held that the objection the jurors were not selected in the particular manner prescribed by the laws of Arkansas could not be sustained. At page 407 the Court stated:

> "* * * but Congress has not made the laws and usages relating to the designation and empanelling of jurors in the respective state courts applicable to the Courts of the United States, except as the latter shall by general standing rule or by special order in a particular case adopt the state practice in that regard. [Citing cases.] In the absence of such a rule or order (and no such rule or order appears to have been made by the court below), the mode of designating and empanelling jurors for the trial of cases in the Courts of the United States is within the control of those Courts, subject only to the restrictions Congress has prescribed, and, also, to such limitations as are recognized by the federal principles of criminal law to be essential in securing impartial juries for the trial of offences."

The Court went on to say at page 408 that there was no claim the jurors for general service during the term at which the defendant was tried were not selected in accordance with the law. The complaint was only that the particular mode in which the trial jury was impaneled was illegal. It was true that that mode was not in conformity with the laws of Arkansas but that objection could not avail the appellant. The Court then stated that the inquiry must thus be whether the jury was organized in violation of any federal principle of criminal law relating to the subject of challenges.

The Court asked:

> "Where his rights in these respects impaired or their exercise embarrassed by what took place at the trial? We think not. * * * Both the accused and the government had ample opportunity, as this examination progressed, to have any juror who was disqualified rejected altogether for cause. A list of all those found to be qualified under the law, and not subject to challenge for cause, was furnished to the accused and to the government, each side being required to make their challenges at the same time, and having notice from the court that the first twelve unchallenged would constitute the jury for the trial of the case.
>
> * * * *
>
> "Was the prisoner entitled, of right, to have the government make its peremptory challenges first, that he might be informed, before making his challenges, what names had been stricken from the list by the prosecutor? In some jurisdictions it is required by statute that the challenge to the juror shall be made by the state before he is passed to the defendant for rejection or acceptance. Such is the law of Arkansas, and the court below was at liberty to pursue that

method. * * * And such is regarded by some courts as the better practice, even where no particular mode of challenges is prescribed by statute. * * * But as no such provision is embodied in any act of Congress, it was not bound by any settled rule of criminal law to pursue the particular method required by the local law * * * but the general rule is, that where the subject is not controlled by statute, the order in which peremptory challenges shall be exercised is in the discretion of the court."

At page 411 of the opinion the court further stated:

"We cannot say that the mode pursued in the court below, although different from that prescribed by the laws of Arkansas, was in derogation of the right of peremptory challenge belonging to the accused. He was given, by the statute, the right of peremptorily challenging twenty jurors. That right was accorded to him. Being required to make all of his peremptory challenges at one time, he was entitled to have a full list of jurors upon which appeared the names of such as had been examined under the direction of the court and in his presence, and found to be qualified to sit in the case. * * * The right of peremptory challenge this court said, * * * is not of itself a right to select, but a right to reject, jurors."

At page 412 it was held:

"It is true that, under the method pursued in this case, it might occur that the defendant would strike from the list the same persons stricken off by the government. But that circumstance does not change the fact that the accused was at liberty to exclude from the jury all, to the number of twenty, who, for any reason, or without reason, were objectionable to him. *No injury was done if the government united*

with him in excluding particular members from the jury. He was not entitled, of right, to know, in advance, what jurors would be excluded by the government in the exercise of its right of peremptory challenge. He was only entitled, of right, to strike the names of twenty from the list of impartial jury men furnished him by the court" (emphasis ours).

In conclusion, the court said:

"Thus, in our opinion, the essential right of challenge to which the defendant was entitled was fully recognized. And there is no reason to suppose that he was not tried by an impartial jury. The objection that the government should have tendered to him the twelve jurors whom it wished to try the case, or that he was entitled to know before making his challenges the names of the jurors by whom it was proposed to try him, must mean that the government should have been required to exhaust all of its peremptory challenges before he peremptorily challenged any juror. This objection is unsupported by the authorities, and cannot be sustained upon any sound principle."

When the case of *Avila v. United States,* 76 F. 2d 39, (9th Cir., 1935) was decided, there was a rule of the court involved which is no longer in existence. Thus the language of the *Pointer* case at page 407 is particularly applicable:

"* * * in the absence of such a rule or order, (and no such rule or order appears to have been made by the court below) the mode of designating and impaneling jurors for the trial of cases in the Courts of the United States is within the control of those Courts * * *"

Further, it is clear that under the holding of the Supreme Court of the United States, the United States District Courts are not restricted in the method chosen for exercising peremptory challenges by the method contained in any particular state law. "* * * the order in which peremptory challenges shall be exercised is in the discretion of the court."

It is to be noted that appellant's brief states:

> "* * * Appellant was forced to drop two challenges because he was refused knowledge of the Government's challenges, despite his request to see them * * * it resulted in Appellant being forced to withdraw a challenge to Harry Green * * * who later became the foreman of the jury * * *."

However, it is to be noted that the reason defense counsel had to remove two of his peremptory challenges was that he had challenged twelve on the list, whereas he was only allowed ten [Rep. Tr. 39-B, 39-C]. Rule 24(b) of the Rules of Criminal Procedure provides that the government is entitled to six peremptory challenges and the defendant to ten. Only when there is more than one defendant may the court allow additional peremptory challenges.

It is further of interest to note that there was no objection by trial counsel to the method of exercising the peremptory challenges. About all he stated with respect to the selection was "if two of them coincide with the peremptory challenges made by the government, perhaps it can be disposed of in that way" [Rep. Tr. 39-B].

As Judge Alexander Holtzoff stated in an article "A Criminal Case in the Federal Court" which is contained in the volume of the Federal Rules of Criminal Procedure,

"* * * a defendant is entitled to a fair and impartial jury and not necessarily a favorable jury."

See also:

Stilson v. United States, 250 U. S. 583, at 585, 586;

United States v. Wood, 299 U. S. 123, at 145.

In *United States v. Macke,* 159 F. 2d 673 (2 Cir., 1947), the method of exercising peremptory challenges was questioned on appeal. The court stated at page 765:

> "The right to exercise peremptory challenges is not a constitutional right. Courts are not limited to any particular method of providing for their exercise (citing cases)."

The system of exercising peremptory challenges in *United States v. Keegan,* 141 F. 2d 248 (2 Cir., 1944) (reversed on other grounds, 325 U. S. 478) resulted in the government exercising the last peremptory challenge with respect to a juror who was excused. The box was then filled by drawing another jury and the jury as thus constituted was formed. Before the trial began defendant complained that the juror who had been drawn in place of the last one excused by the government was not satisfactory to them and that they had had no opportunity for challenge. "In other words, they maintained that they should have been allowed to exercise their last challenge after the government's challenges had been exhausted."

The court held at page 255:

> *"In Pointer v. United States,* 151 U. S. 396, 410, * * * a unanimous court, speaking by Justice Harlan, enunciated the general rule that where, as in the

case at bar, 'the subject is not controlled by statute, the order in which peremptory challenges shall be exercised is in the discretion of the court.' In *Lyon v. State,* 116 Ohio St. 265, 155 N. E. 800, the Supreme Court of Ohio, relying on *Pointer v. United States, supra,* sustained the very method of exercising challenges which the trial judge adopted in the case at bar. In *Commonwealth v. Piper,* 120 Mass. 185, the court said that 'the statutes conferring and defining the right of challenge in capital cases contain no provision as to the order and time in which the right shall be exercised by the government or by the defendant * * *. There is no general rule of court upon the subject, and all directions as to the time when and the motive which either party shall challenge, except so far as regulated by the statutes, like other matters affecting the proper conduct and order of the trial, are within the discretion of the court.' See also: *Philbrook v. United States,* 8 Cir., 117 F. 2d 632, 635, certiorari denied 313 U. S. 577, * * *. The appellants were deprived of no right to exercise one of the peremptory challenges given them by statute, but were merely required to exercise their challenge at a particular time. We are clear that the court in adopting the alternating system infringed no legal right of the defendants and that the jury was properly selected."

The rights of a defendant in choosing a jury are clearly defined in *Kloss v. United States,* 77 F. 2d 462, at p. 463:

"Moreover, the courts have uniformly said that the right of a defendant in picking a jury trial is bottomed not on selection, but on rejection * * * no defendant has the right to have any particular juror or jurors on the trial panel. * * * His sole right to reject or object ends when a fair and impartial panel

has been chosen. It is nowhere contended by appellant that the jury which tried him was unfair, impartial or prejudiced. *Pointer v. United States,* 151 U. S. 396, 412, * * * and if it had been, as to component members, he could by exercising his peremptory challenges, which he did not exhaust, have thus rid himself of those to whom he objected * * * it is persuasive, though not controlling, that the rule in Arkansas seems to be in accord * * *."

See also:

Radford v. U. S., 129 Fed. 49, at p. 53 (2 Cir., 1904).

In *Philbrook v. United States,* 117 F. 2d 632 (8 Cir., 1941) the court held at page 635, 636:

"The Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to a trial by an impartial jury. There is nothing in the Constitution which requires Congress to grant peremptory challenges to the accused, or which limits the court to any particular method of securing to an accused the right to exercise the peremptory challenges which Congress grants him. * * * The order in which peremptory challenges must be exercised is within the discretion of the trial court. *Pointer v. United States,* 151 U. S. 396, 410 * * * it can require the government to exercise its peremptory challenges first; but it is not required to do so * * * the only limitations upon a court of the United States in impaneling a jury is that the system used must not be one 'that prevents or embarrasses the full, unrestricted exercise by the accused of his right of peremptory challenge', and must not be inconsistent with any settled principle of criminal law, or interfere with the selection of a partial jury.

"The court below was free to follow any method in impaneling a jury which did not impair the free exercise by the defendants of their right to challenge. The statute gave to the defendants the right to challenge peremptorily ten jurymen. That right is the right of rejection, and not of selection * * * the order of challenging was within the discretion and control of the trial court, and there was no abuse of discretion * * * there is no claim that the jury was in fact unfair or impartial."

See also:

Hall v. United States, 168 F. 2d 161 (Ct. of App., Dist. of Col., 1947), at p. 164.

A defendant's right to a particular juror was again discussed in *Watts v. United States,* 212 F. 2d 275 (10th Cir., 1954). At page 279 the court held:

"The great weight of authority is that a defendant is not entitled to any particular jury so long as a fair and impartial jury of qualified jurors is selected and a defendant is not deprived of his right to exercise his peremptory challenges. In *United States v. Chapman* (10th Cir. 1958), 158 F. 2d 417, 419, we said, '* * * An interested party to a lawsuit has no vested right to any particular juror'. The trial court is vested with a considerable discretion in the selection of a jury. Since no contention is made that the juror selected to sit in the place of La Rock was not qualified, appellant suffered no prejudice by his dismissal from the jury. *He had what he was entitled to, a fair and impartial jury of competent and qualified jurors'* (emphasis ours).

See also:

United States v. Puff, 211 F. 2d 171, at 184, 185 (2d Cir., 1954).

To the same effect, see:

United States v. Costello, 255 F. 2d 876, (2d Cir., 1958),

where the court at page 884 said that the crucial question was whether the appellant had been tried by a fair and impartial jury and that the exercise of peremptory challenges is a rejective, rather than a selective process of which the appellant has no right to complain, citing the *Hall* and *Puff* cases, *supra.*

As early as 1912, it was held that the order in which peremptory challenges shall be exercised is a matter within the discretion of the trial court. In so holding, the court in *Emanuel v. United States,* 196 Fed. 317, at 321 cited the case of *Pointer v. United States,* 154 U. S. 396, *supra.*

See also:

Simpson v. United States, 184 Fed. 817, at 819 (8th Cir., 1911).

Thus it is respectfully submitted that the trial court below exercised his sound discretion in choosing the particular manner of exercising peremptory challenges which was used in the selection of the jury. The defendant was given the right to reject ten jurors allowed to him under the Federal Rules of Criminal Procedure. He was entitled to nothing further than his constitutional right to a fair and impartial jury. There is no complaint in this case that the jury was not actually fair and impartial as constituted.

(3) No Error Was Committed by the Trial Court in Denying Motion to Exclude Witnesses.

It is of interest to note that in making this point on appeal appellant has claimed that "prejudicial" error was committed by the trial court in failing to exclude witnesses. However he has failed to set forth in what respect any prejudice was committed.

At any event, it is clear that the power to put witnesses under the "rule" is discretionary with the trial court. This Honorable Court has so held in the case of *Charles v. United States,* 215 F. 2d 831 (9th Cir., 1954):

> "The prime purpose of putting witnesses under the rule is to prevent them from shaping their testimony to match that given by other witnesses in their hearing. In this case, so far as the record shows, the District Court had no reason to believe or suspect that any witness would shape his testimony to match that given by any other witness nor does it appear from the record that any witness did so shape his testimony.
>
> "It is true that some of the witnesses gave testimony which corroborated testimony given by some of the other witnesses, but it does not follow that the corroborating testimony was shaped to match the corroborated testimony, or that the District Court abused its discretion in refusing to put the corroborating witnesses under the rule."

See also:

Witt v. United States, 196 F. 2d 285 (9th Cir., 1952).

To a similar effect, see: *Mitchell v. United States,* 126 F. 2d 550 (10th Cir., 1942), at page 553:

> ". . . and the Court's discretion will not be disturbed in the absence of a manifest prejudice resulting from the presence of witnesses during the trial of the case. . . . There is nothing in the record which tends to indicate that the defendant was prejudiced or the jury was influenced by the refusal of the Court to exclude witnesses from the Courtroom during the trial, and there is no error in the Court's refusal to invoke the rule."

A good discussion of the "rule" is contained in *United States v. Postma,* 242 F. 2d 488 (2d Cir., 1957). The Court there said it was better to leave the decision to the trial court rather than to adopt a rigid rule requiring exclusion of all witnesses as a matter of right.

> "Not infrequently justice may be better served, we think, by allowing witnesses to remain in the courtroom than by relegating them to the public corridors of the court house, where they may be exposed to the possible importunities and threats of hostile parties. We do not overlook Wigmore's advocacy of the rule of exclusion as a right. 6 Wigmore, Evidence, Sec. 1839 (3rd Ed., Supp. 1955). Nevertheless we adhere to the principle underlying the discretionary rule prevailing in the Federal Courts. . . . we hold that no abuse of discretion has been shown."

The Government has set forth in this brief a statement of the testimony which was given by all of the witnesses in the case and it is obvious that the eye witness' statements involved different times, places and events. It is further clear that the testimony of the two experts, examiners of questioned documents, played an important part

in the pinpointing of the appellant as the person who had perpetrated the entire series of transactions.

Appellant does not claim that the District Court had any reason to believe that the Government's witnesses would shape individual testimony to match that of other witnesses. Further, as the record of the trial shows, there is absolutely no showing that this actually happened. Certain Government witnesses, Mrs. Gray, the Postmaster, Mr. Evans, the banker and Mrs. Carlton, who worked at another bank, identified appellant as the person with whom they dealt in their respective transactions. However, other postmasters and bank personnel were only able to give a description of the person involved and so stated. In other words, the persons who knew him to be the person with whom they dealt, said so. Those who could not identify him, said so. There is nothing in the evidence which shows that they were other than absolutely fair and honest in relating the events in which they had participated. Each one testified to a different situation, which Government counsel had previously stated she believed would be the case.

Although the testimony of the various persons concerned with the renting of post office boxes and the opening and processing of the bank accounts was a key point in the Government's case, it is obvious that the testimony of the handwriting experts had much to do with the defendant's conviction. Appellant claims in his brief that one expert said he was not able to identify appellant as the writer of the returns, checks, etc., [Rep. Tr. 339] and that the other one came to the opinion that the exemplars, returns and checks were not written by the same person

[Rep. Tr. 393]. However those statements are taken out of context of the *entire* testimony of the experts. The point of Mr. Black's statements in which he said he was not able to identify the writing of the exemplars, appellant, as the writer of any of the "stylized" writing in the questioned documents, was graphically illustrated by the illustration which he gave to the jury. Mr. Black wrote two of his own signatures in his natural writing and two signatures in unnatural writing. Although he had written all four signatures he stated that it would be impossible for another expert, who had not seen him do the writing, to state that the person who wrote the natural writings had also written the unnatural writing. Further Mr. Black stated that the handwriting of the appellant as shown in the exemplars was of sufficient skill so that he *could have written* the stylized samples of questioned writing [Rep. Tr. 340]. Mr. Sloan's testimony was to the same effect. Mr. Sloan also stated that the person who wrote the exemplars was *capable* of writing the stylized items [Rep. Tr. 394, 395].

Also in connection with the handwriting evidence, it is of great importance to note that, on the post office application in the name of "Peter Hall", both experts testified without qualification that that signature was the same as the natural handwriting of appellant. Thus, it was clear that appellant had "slipped up" and placed his own natural writing on one of the significant documents involved in the entire series of fraudulent transactions, which documents contained the stylized writing which the experts testified had all been written by the same person.

It is clear that the court did not abuse its discretion in refusing to exclude the witnesses in this case. Further,

absolutely no prejudice has been pointed out by appellant or shown in the record as a result of the presence, if any, of witnesses in the courtroom.

(4) Forgery and Uttering of Forged Checks Was Proven on Counts Two, Three, Seven, Eight, Twelve, Thirteen, Twenty and Twenty-one Under Title 18, U.S.C. Sec. 495.

Appellant states at page 18 of the opening brief that "the Government's evidence is that the Joseph J. Cook who filed the return and to whom the check was sent was the Joseph J. Cook who endorsed the check and uttered it."

Of course, it must be remembered that the Government's evidence showed that all of the documents involving the other names, Peter Hall, Sidney Jones, Sidney J. Jones, Stanley Jones, Walter Adams, James Adams, Joseph Cook, Kenneth Cook, Joseph J. Cook, William Hall, William H. Hall, James Jones, Allan Jones and Allan James Jones, Government checks being issued for four of the names, contained "stylized" writing *by the same person*. That evidence, together with all the other facts proven in the case, showed that the names on the four Government checks were fictitious names. Further, there is no evidence that the appellant used the various names involved in the case except to perpetrate the offenses charged in the indictment. In other words, he was "known" only for a limited, dishonest purpose by those names. One could not reasonably say that a defendant was using his true or "known" name on a forged check, when such name was used only for the limited purpose of using the checks.

The law which applies to the within matter, where the evidence showed appellant caused the issuance of a check

to a fictitious person by the filing of a false return in the name of the same person, should not be materially different from a case where checks were stolen from a bank which bore the name of no payee. In *Rowley v. United States,* 191 F. 2d 949, (8th Cir., 1951) the latter situation had occurred. After the checks came into the possession of the defendant he placed in his own handwriting thereon for the name of the payee, "Len E. Allen". That name was a fictitious one. In other words, there the defendant had received checks which had been duly signed and issued but which did not bear the name of a payee. He filled in the name of fictitious parties. Here, the checks were also duly signed and issued but the appellant had caused the checks to be issued in the names of fictitious payees. The only difference in the two cases was that one set of checks was received with the names of no payees, which the defendant filled in with fictitious names, and in this case the defendant caused the checks to be issued in the names of fictitious payees. In the *Rowley* case the Court affirmed the judgment which was based on a charge of three counts of violations of the National Stolen Property Act, Section 2314, Title 18, United States Code.

Of some pertinence herein is the case of *Buckner v. Hudspeth,* 105 F. 2d 393 (10th Cir., 1959) in which the Court stated:

> "Furthermore, to constitute forgery the name alleged to be forged need not be that of any person in existence. It may be wholly fictitious if the instrument is made with intent to defraud and shows on its face that it has sufficient efficacy to enable it to be used to the injury of another."

In *Milton v. United States,* 110 F. 2d 556 (Ct. of App., Dist. of Col., 1940) it was held at page 560:

> "It is enough if the forged instrument be apparently sufficient to support a legal claim and thus to effect a fraud. It is well settled that the signing of a fictitious name, with fraudulent intent, is as much a forgery as if the name used was that of an existing person. *The public mischief, i.e., the legal tendency to defraud, is equally great in either event.*" (Emphasis ours.)

The case of *Greathouse v. United States,* 170 F. 2d 512 (4th Cir., 1948), cited by appellant at page 17 of his brief, is not applicable. It should be noted that the defendant signed the checks involved in that matter in his own name, "Woodruff Motor Sales, Inc., J. W. Greathouse." The Court at page 514 held that the charge of forgery was not sustained by the fact that the defendant, with intent to defraud, drew the checks *in his own name* upon a bank in which he had no funds. The fact that he added the words "Woodruff Motor Sales, Inc." was immaterial.

> "It is true that the authorities hold that forgery may exist even if the name used be an assumed or fictitious one; . . . But this rule is properly applicable only when the writing is issued as the writing of the fictitious individual and not when the name is signed by the defendant himself under the pretense that he has been authorized by an existing person to sign his name. When the writing is not passed off as the writing of another, it is immaterial whether the person it purports to designate is real or fictitious."

Likewise the case of *United States v. Greever,* 116 Fed. Supp. 766 (Dist. of Col., 1953), cited in appellant's brief at page 18, is not controlling. Even so, the Court there stated at page 756 that: "And the signature of a fictitious name, with fraudulent intent, is as much a forgery as if the name used was that of an existing person."

In *Hubsch v. United States,* 256 F. 2d 820 (5 Cir., 1958), also cited in the Appellant's Brief, appellant received treatment at a hospital representing himself as being "Alfred Weinstein." In payment he gave a check signed "A. A. Weinstein" drawn on a bank in another state. It was the basis of a charge under Section 2314 of Title 18, United States Code. A second such check transaction occurred in connection with the purchase of jewelry where he represented himself as Weinstein, a Mason. Both checks were returned with the notation "unable to locate." The court stated:

> "The second contention concerning the indictment is that no offense was alleged because it charged that appellant 'alias A. A. Weinstein', caused the interstate transportation of two falsely made and forged checks signed 'A. A. Weinstein' knowing the same to have been falsely made and forged. The argument is that an alias is, by definition, a name by which a person is 'otherwise called', so that the making of a writing in that name is in the person's own name and is not a forgery. Support for the position urged is not lacking in a number of decisions of State Courts. See 49 A. L. R. 2d 852, 868-869, 888-889. Under the so-called narrow rule defining forgery, hereinafter discussed, the strict and technical doctrine of construction of the indictment for which the ap-

> pellant contends might be proper. But *we reject the narrow doctrine* and hold that, under the circumstances herein stated, *a forgery may be committed by the fraudulent use of an assumed or fictitious name.*"

The court reversed on both counts although it stated an offense was shown under count two. The distinction made by that court was that in connection with the hospital treatment Weinstein had not created any "character or personality associated with the name"; however, he had done so with the purchase of the jewelry since he had represented himself as the holder of several Masonic cards from Atlanta, thus creating "a fictional personality of Weinstein, the Mason who desired to purchase the Masonic ring. * * *"

First, it is submitted that such a fine distinction should not lie under the *broad* rule. However, if it does, Hanson used assumed names with the banks "to designate a fictitional person with characteristics, personality and assemblance of identity." *Otherwise, the banks would never have deposited the four checks to the accounts.*

Further, the appellant had used the same names previously for *dishonest purposes.* The court in *Hubsch* stated at page 823 that it was not, in effect, passing upon the question "if a person assumes a fictitious name as an alias, and it neither appears that the name assumed was a factor in procuring credit upon the instrument signed with the fictitious name *nor that the alias was previously assumed for a dishonest purpose,*" whether or not the signing of the alias or assumed name would be a forgery.

Thus, it is submitted that the convictions on the above forgery and uttering counts were valid.

(5) No Misconduct Occurred in the Arguments.

Appellant states that he was denied a fair argument because he was interrupted four times by Government counsel. However it is submitted that the minor interruptions shown in the transcript of record were warranted. Government counsel spoke up for the first time in an effort to assist Mr. Turner. He inadvertently said the agency in the case was the "Secret Service." Government counsel stated "not the Secret Service, if I may correct the record." This interruption was of no particular importance and Government counsel said nothing further when the Court admonished her for the interruption. [Rep. Tr. 531].

However, considerably later in appellant's argument Government counsel did interrupt him again when he endeavored, in effect, to testify. This was when he started to explain why the defendant didn't take the stand and testify. It was obviously because Turner had previously said in his opening statement it was his decision. [Rep. Tr. 68]. The Court at that point had told Mr. Turner that the Court would instruct on the law. It was improper for trial counsel for appellant to attempt to make the same contention on this touchy subject in his argument, since it amounted to giving testimony. In fact the Court advised him at the time "Well, counsel, you cannot testify as to your usual practices, and so on" [Rep. Tr. 542, 543]. Thus the interruption was entirely warranted.

The interruption which occurred at Page 550 was respect to counsel for appellant's statement as to what was happening as shown by the newspapers during the period

involved in the case. Mr. Turner stated that the jury could take judicial notice of the fact that there was a recession going on but the Court stated "Well now, if we are going to take judicial notice, we ought to have our geography correct. I think you are going a little beyond what the evidence shows. I don't mean to put you in a straight-jacket, but think of what you are saying, and bear in mind, please, the actual geography of the state, and you can argue the reverse, if you want to." Mr. Turner then went on to argue the recession. [Rep. Tr. 550].

In connection with the arguments with respect to the geography involved between Los Angeles and Taft, California, which related only to the transactions involving Peter Hall and Joseph J. Cook, Government counsel mentioned the distance from Los Angeles to Taft in her opening argument. (It is to be remembered that Mr. Hanna had testified that the distance from Taft to Bakersfield was approximately 40 miles. [Rep. Tr. 151].) In the opening argument Government counsel stated: "It doesn't take very long to get up to Taft; if you really want to get there you can travel up there in a couple of hours, ladies and gentlemen, or just a little over it." She then went on to discuss the fact that Mr. Evans had handled the transaction in question after 3:00 P.M. on that day and the defendant had "hours to get up and hours to carry forth this transaction." [Rep. Tr. 510, 511]. No objection was made to this argument by trial counsel. Rather, Mr. Turner also argued the time involved to considerable extent. He stated that Taft was 40 miles beyond Bakersfield and he had never been able to get to Bakers-

field in less than 3 hours. "Maybe some of you have but I never have. Taft is another 40 miles beyond that. I don't believe it is possible to make that in less than 4 hours driving like a maniac. But even if it is it is an awfully close thing . . ." [Rep. Tr. 549, 550]. In other words, he also assumed the jury was familiar with the geography. It was after that the Court stated: "Well now, if we are going to take judicial notice, we ought to have our geography correct. . . . Bear in mind, please, the actual geography of the state. And you can argue the reverse, if you want to." [Rep. Tr. 550].

In closing argument Counsel for the Government treated the matter to some limited extent by stating that Taft was not 40 miles north of Bakersfield but was well on the south side of Bakersfield. "I think we all know you can make it to Taft in 2½ hours if you want to make it in that kind of a hurry. . . . If a person has a real incentive to get to that city in a certain time, and establishes an alibi somewhere else before going." [Rep. Tr. 555, 556].

It appears first of all that trial counsel for appellant joined in with Government counsel in arguing the distance between Los Angeles and Bakersfield, obviously on the assumption that every one concerned, including the jury, was familiar with the geography of the state. Furthermore the Court, in view of the argument that was made, appeared to take judicial notice of the geography. It was more or less admitted by Appellant's trial counsel that Taft is only several hours away from Los Angeles and the question was whether the defendant could have made it in the time involved. The real question was not

particularly the distance, since Taft is only 40 miles away from Bakersfield, but whether or not appellant was sufficiently skilled in driving to have made it up to Taft in the time allotted. It is felt that appellant, particularly because he joined in the argument of the matter without objection, was not prejudiced in any respect by the argument made by Government counsel. Anyway, the credibility of defense witnesses was for the jury.

It is to be noted that present counsel for appellant only appears to stress the fact that Taft was *slightly* farther from Los Angeles than Bakersfield, but makes no complaint about the absence of any specific testimony of the distance from Los Angeles to Bakersfield. The small distance between Bakersfield and Taft could have made no substantial difference in the case.

Further, Government counsel did not discredit appellant's trial lawyer in any way in the argument. A reading of the entire opening and closing argument shows that all of the statements made with respect to Mr. Turner were made in the context that there was actually no defense, that his techniques and physical movements during argument were used because of the difficulty in discussing such lack of defense. [Rep. Tr. 557]. In fact Government counsel stated ". . . I don't mean to depreciate Mr. Turner as an attorney, I think he has done everything he could do with the lack of defense that he has. But, as a matter of fact, when you boil his argument down, he has actually said very, very little. I won't say he has said nothing, but he has said very little to you with respect to the evidence in the case." [Rep. Tr. 555].

Certainly Government counsel was entitled to comment on Mr. Turner's action in holding up the fine print of the court rules for attorneys before the jury for a short period of time and then arguing, in effect, that they could not possibly hope to remember what was contained in the document. "It was just a courtroom stratagem obviously designed to distract [the jury] from the evidence in the case."

The only reason that Government counsel made a remark about Mr. Turner talking to the jury out of her hearing, was that she was not sure what he had said. She then assumed what his statement had been and went on to argue the matter.

It is true that "prosecuting attorneys occupy very high and responsible positions" but it is also true that some latitude in expression is allowed to counsel for both parties in argument during the heat of the trial. There was nothing in the argument by Government counsel in this case that prejudiced appellant in any way or that was not stated in a spirit of fair play, giving counsel for defendant an adequate chance to respond.

(6) The Verdict Was Not Fatally Defective and Unintelligible.

It is obvious, from looking at the verdict, [Rep. Tr. 23], that the jury inadvertently struck out the word "guilty" in front of the statement "as charged in Count One of the Indictment." This apparently was due to some confusion as to the way in which the verdict started out. However it is obvious that the jury found the defendant guilty on Counts Two through Twenty-Two.

It is perfectly clear that in each one of the Counts, except for Count One, it is plainly stated that the appellant was found guilty. For instance, it reads: "Guilty as charged in Count Two of the Indictment, Guilty as charged in Count Three of the Indictment . . ." up to "Guilty as charged in Count Twenty-Two of the Indictment." There is no doubt that the jury intended to find the defendant guilty on each one of those counts. Furthermore, the court gave the defendant the benefit of the doubt on the verdict as returned on count One of the Indictment and dismissed that count since the word guilty had been scratched out. Thus he was not sentenced on that count and no prejudice whatsoever occurred.

The Judgment should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant United States Attorney,
Chief, Criminal Division,

LEILA F. BULGRIN,
Assistant United States Attorney,
Attorneys for Appellee,
United States of America,